 ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Satellite Home	)	
Viewer Improvement Act of 1999	)	CS Docket No. 99-363
	)	
Retransmission Consent Issues	)	

REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST"), by its attorneys, hereby submits its comments with respect to the FCC's *Notice of Proposed Rulemaking* ("*NPRM*") in the above-captioned proceeding.

I. INTRODUCTION.

Contrary to what the Commission has suggested in its Sixth Annual Report on the status of competition in markets for the delivery of video programming, U S WEST has devoted substantial financial and human resources toward constructing and operating franchised "overbuild" cable systems in areas encompassing approximately 800,000 homes passed.[1/] Given the Commission's acknowledgment that incumbent cable operators remain the dominant providers of multichannel video programming in local markets,[2/] and that many consumers will not have access to "local into

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[1/] Comments of U S WEST, Inc. at 1 (the "U S WEST Comments"). *Compare Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, FCC 99-418, at ¶ 15 (rel. Jan. 14, 2000) ("It now appears that [LEC] rate of entry into the MVPD marketplace may be slowing.").

[2/] *Id.* at ¶ 5.

local" DBS service for the foreseeable future,[3/] now clearly is not the time for the Commission to undermine the efforts of U S WEST and other overbuilders by adopting retransmission consent rules that deny cable's competitors nondiscriminatory access to broadcast programming. Congress recognized as much in Section 1009(a) of the Satellite Home Viewer Improvement Act of 1999 (the "SHVIA"), and thus mandated that the local television stations negotiate retransmission consent agreements with alternative multichannel video programming distributors ("MVPDs") in "good faith," subject to the further requirement that where a broadcaster offers retransmission consent to different MVPDs on different terms and conditions, such differences must be justified by "competitive marketplace considerations."

Though the broadcasters would prefer the Commission to believe otherwise, it is clear from the text and legislative history of Section 1009(a) that the phrase "competitive marketplace considerations" does not refer solely to what is in the best economic interests of local television stations. Such a narrow reading simply cannot be squared with Congress's broader objective of promoting robust *MVPD* competition in local markets. For the reasons set forth herein and in U S WEST's initial comments, the Commission should reject the broadcasters' self-serving reading of the statute and instead craft rules that protect alternative MVPDs with no market power from

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[3/] *See* Remarks of Rep. Rick Boucher, 145 Cong. Rec. H2319 (daily ed. Apr. 27, 1999) ("I am concerned, however, that the business plans of the [DBS] carriers that have announced an interest in offering the local-to-local services extend only to the largest 67 out of 211 local television markets around the country. Under this plan, most of rural America simply will not receive the benefit of this local-into-local service."; Neel, "DBS Future Looks Bright," *Cable World*, at 9 (Jan. 3, 2000) ("Only four major broadcasters -- ABC, CBS, NBC and Fox - - as well as the national PBS feed will be available on DBS broadcast tiers. Independents and network affiliates from the WB and UPN won't be available to DBS customers. That may not sound like a big deal. But in many markets local broadcast rights for sports teams often go to a local independent station.").

anticompetitive retransmission consent agreements, without compromising the legitimate expectations of television broadcast stations during the retransmission consent process.

II. ARGUMENT.

A. The Comments of the Broadcasters Reflect A Fundamental Misunderstanding of the Text and Purpose of Section 1009(a) of the SHVIA.

The broadcasters make no bones about their agenda in this proceeding: they are asking the Commission to interpret Section 1009(a)'s "good faith" requirement merely as a mandate that a broadcaster sit at the negotiating table and discuss a retransmission consent agreement with an alternative MVPD, without reference to whether the broadcaster's proposed terms and conditions for granting retransmission consent are anticompetitive.[4/] Obviously, had Congress intended that the statute be interpreted in this manner, it would not have included the reference to "competitive marketplace considerations" in the statute. Indeed, the legislative history of Section 1009(a) confirms that Congress was concerned with substance as well as procedure where retransmission consent agreements are concerned:

> [T]here may be some disagreement as to what exactly this new provision means. At the very least, "competitive market considerations" may simply be interpreted as the normal, everyday jostling that takes place in the business world. At the very most, a "competitive marketplace" would tolerate differences based on legitimate cost justifications, but not anticompetitive practices such as illegal tying and bundling.[5/]

[4/] *See, e.g.,* Comments of National Broadcasting Company, Inc. at 6-9 (the "NBC Comments"); Joint Comments of the ABC, CBS, Fox and NBC Television Network Affiliate Associations at 15-19 (the "Network Affiliate Comments"); Comments of the National Association of Broadcasters at 19-22 (the "NAB Comments"); Comments of CBS Corporation at 12-14 (the "CBS Comments").

[5/] Statement of Senator Kohl, 145 Cong. Rec. S15017 (daily ed. Nov. 19, 1999).

The above-quoted language belies the broadcasters' contention that the "good faith" requirement in Section 1009(a) exists exclusively for their benefit, and that they are free to demand that alternative MVPDs accede to anticompetitive terms and conditions for retransmission consent, the statute's requirement of "*competitive* marketplace considerations" notwithstanding. U S WEST thus supports those commenting parties who have recommended that the Commission give full faith and credit to Congressional intent by incorporating strong anti-discrimination criteria into its definition of "good faith" negotiations, and that the Commission interpret the term "competitive marketplace considerations" as prohibiting forced tying or bundling arrangements in any retransmission consent agreement.[6/] Similarly, U S WEST agrees that (1) the tying of retransmission consent to an MVPD's attainment of minimum penetration levels is *per se* discriminatory as to alternative MVPDs (and, in particular, non-DBS MVPDs such as cable overbuilders),[7/] and (2) where a broadcaster attempts to extract cash payments as a *quid pro quo* for retransmission consent, that broadcaster must sustain a high burden of proving that such payments are based on "legitimate cost justifications," especially if the alternative MVPD is being charged a higher rate than the incumbent cable operator with which it competes.[8/]

[6/] *See, e.g.,* Comments of DirecTV, Inc. at 7-9 (recommending that *per se* violations of "good faith" requirement include mandatory tying of retransmission consent to carriage of a broadcaster's other analog or digital stations); Comments of EchoStar Communications Corporation at 12 (same); Comments of BellSouth Corporation *et al.* at 12-13 (any attempt by a broadcaster to impose non-optional tying arrangements on a competing MVPD in exchange for retransmission consent should be deemed a *per se* violation and be actionable as such); Comments of The Wireless Communications Association International, Inc. ("WCA") at 14-15; Comments of the American Cable Association ("ACA") at 18.

[7/] *See* BellSouth Comments at 17-18.

[8/] *Id.*; *see also* ACA Comments at 18.

B. The Broadcasters Have Little or No Economic Incentive To Enter Into Reasonable Retransmission Consent Agreements With Cable's Competitors.

As pointed out in U S WEST's initial comments, the competitive imbalance which motivated Congress to adopt the retransmission consent law in 1992 does not exist as between cable overbuilders and local broadcasters.[9/] Whereas the market power of the cable MSOs persists to this day, and in fact has increased to the extent that consolidation among the cable MSOs forces a local broadcaster to deal with a single cable operator who controls the lion's share of a market's subscribers, U S WEST's cable overbuild systems control only a relatively small number subscribers in local markets and thus do not have market power *vis-a-vis* local television stations or any other provider of video programming. As a result, U S WEST has far less leverage than incumbent cable operators when negotiating retransmission consent agreements with local television stations, and the Commission's implementation of the "good faith" and exclusivity provisions of Section 1009 must reflect this basic economic fact.

The broadcasters nonetheless contend that the Commission need not protect alternative MVPDs from discriminatory or otherwise anticompetitive retransmission consent agreements, on the theory that television stations must maximize their distribution in order to sell advertising, and that as a result they already have more than ample incentive to deal fairly with cable's competitors during the retransmission consent process.[10/] That argument, of course, is very difficult to reconcile with the fact that, in the case of NBC and CBS, the national television networks have given

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[9/] *See* U S WEST Comments at 3-4.

[10/] *See* NAB Comments at 1-2; NBC Comments at 1-2.

incumbent cable operators exclusivity for their advertiser-supported *cable* programming during retransmission consent negotiations.[11/] Moreover, the broadcasters' self-serving rhetoric notwithstanding, the fact remains that in most cases a cable overbuilder's relatively small subscriber base has no material impact whatsoever on a television station's advertising sales, and thus a television station's decision to withhold retransmission consent from a cable overbuilder carries little or no economic risk. Indeed, withholding retransmission consent from an overbuilder *benefits* a television station to the extent that it placates the incumbent cable operator who controls the vast majority of the market's subscribers and thus is in a position to cause the station substantial economic harm. It is this scenario, and not the fanciful picture painted by the broadcasters, which must guide the Commission's reading of Section 1009(a) and the underlying intent of the statute.

C. The Commission Has Authority Under The Communications Act To Adopt Expedited Procedures For Retransmission Consent Complaints Filed Under Section 1009(a).

Citing the fact that the SHVIA establishes expedited complaint procedures only where a broadcaster is the complainant in a formal retransmission consent dispute, the broadcasters contend that the Commission should not adopt similar procedures where an alternative MVPD is the complainant in a retransmission consent proceeding brought under Section 1009(a).[12/] Courts, however, have long recognized that the Commission has wide discretion under Section 154(j) of the Communications Act to manage its procedures "as will best conduce to the proper dispatch of

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[11/] *See, e.g.*, WCA Comments at 8-9.

[12/] *See, e.g.*, NAB Comments at 32.

business and to the ends of justice."[13/] Not long ago, the Commission exercised that authority in adopting expedited processing rules for program access complaints,[14/] and, for the reasons already set forth by U S WEST and various other commenting parties in this proceeding, the indispensability of broadcast programming to alternative MVPDs provides even greater justification for the Commission to take similar action where retransmission consent complaints under Section 1009(a) are concerned.[15/]

III. CONCLUSION.

Without question, consumers will not realize the benefits of a fully competitive MVPD marketplace if the Commission elects to implement Section 1009(a) along the very narrow lines suggested by the broadcasters. Again, U S WEST emphasizes that it has been and continues to be more than willing to negotiate retransmission consent agreements with local television stations on reasonable terms and conditions. Consistent with the broader pro-competitive objectives of the

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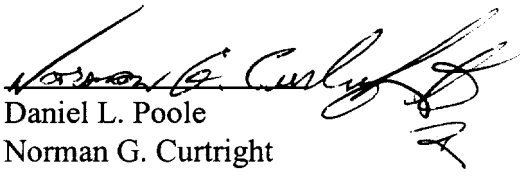
[13/] *GTE Service Corporation v. FCC*, 782 F.2d 263, 273 (D.C. Cir. 1985), *quoting* 47 U.S.C. § 154(j).

[14/] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822 (1998) (adopting 6-month and 9-month time limits for processing of "refusal to deal" and price discrimination complaints, respectively).

[15/] *See* WCA Comments at 16; EchoStar Comments at 24; DirecTV Comments at 16; U S WEST Comments at 8.

SHVIA and the Commission's public interest mandate under the Communications Act, the Commission can and should adopt rules in this proceeding that give U S WEST and all other alternative MVPDs a full and fair opportunity to do so.

Respectfully submitted,

By: 

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January 21, 2000

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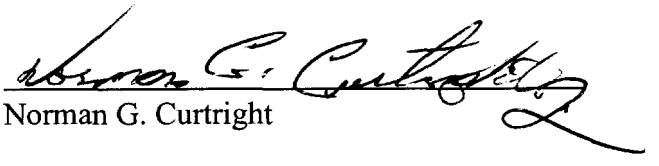

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